No. 89-1117

In The

Supreme Court of the United States

October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,

Petitioner,

vs.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS – COUNTY OF HARRIS,

Respondents.

REPLY BRIEF TO THE STATE OF TEXAS' MOTION FOR LEAVE TO INTERVENE TO FILE BRIEF IN OPPOSITION AND BRIEF IN OPPOSITION

ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

DECATUR J. HOLCOMB
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner

*Counsel of Record

April 6, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.1 LIST

A complete list of Petitioner First National Bank of Bellaire's parent companies, subsidiaries, and affiliates is included in the petition for writ of certiorari.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

No. 89-1117

In The

Supreme Court of the United States

October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,

Petitioner,

vs.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS - COUNTY OF HARRIS,

Respondents.

REPLY BRIEF TO THE STATE OF TEXAS' MOTION FOR LEAVE TO INTERVENE TO FILE BRIEF IN OPPOSITION AND BRIEF IN OPPOSITION

To the Supreme Court of the United States:

First National Bank of Bellaire ("Bellaire"), Petitioner, respectfully submits this reply brief in response to the State of Texas' motion for leave to intervene to file brief in opposition and brief in opposition.

STATUTORY PROVISIONS

Section 41.412(a) of the Texas Tax Code, effective August 31, 1987, provides: "A person who acquires

property after January 1 and before the deadline for filing notice of the protest may pursue a protest under this subchapter in the same manner as a property owner who owned the property on January 1."

Section 41.44(a) of the Texas Tax Code provides, in relevant part: "Except as provided by Subsections (b) and (c), to be entitled to a hearing and determination of a protest, the property owner initiating the protest must file a written notice of the protest with the appraisal review board having authority to hear the matter protested. . . ."

Section 41.44(d) of the Texas Tax Code provides:

> A notice of protest is sufficient if it identifies the protesting property owner, including a person claiming an ownership interest in the property even if that person is not listed on the appraisal records as an owner of the property, identifies the property that is the subject of the protest, and indicates apparent dissatisfaction with some determination of the appraisal office. The notice need not be on an official form, but the State Property Tax Board shall prescribe a form that provides for more detail about the nature of the protest. The form must permit a property owner to include each property in the appraisal district that is the subject of the protest. The State Property Tax Board, each appraisal office, and each appraisal review board shall make the forms readily available and deliver one to a property owner on request.

ARGUMENT

Significantly, the Attorney General[1] does not contest the fact that Bellaire was denied due process when it was deprived of notice and the opportunity to contest the 1985 tax appraisal on the property on which it held a first lien. Instead, he proposes that the Court simply overlook this constitutional violation, and he implies that Bellaire's petition may be disposed of by reference to party joinder rules. First, he incorrectly contends that the section 41.44(d) of Texas Tax Code has been amended to remedy the constitutional infirmity to which Bellaire fell prey. Second, he contends that Bellaire should not be permitted to defend its property interest against the enforcement of a constitutionally invalid lien by simply raising the invalidity of the lien as against whichever governmental unit is attempting to avail itself of the benefits of the lien.

Neither contention is meritorious, and the very fact that the Attorney General so interprets Texas law emphasizes the need for this Court's ruling on these substantial issues. As discussed more fully below, the first contention

---

[1] Although Bellaire does not oppose the Attorney General's intervention in this case, certain misstatements in his motion for leave to intervene should be corrected. The Attorney General was served with three copies of the petition for writ of certiorari on January 5, 1990. On January 29, 1990, he was served with notice of docketing and counsel appearance forms. Moreover, Bellaire was under no obligation to notify the Attorney General at the state court level as the Attorney General implies on page 2 of his motion because the statute requiring service on the Attorney General only applies to declaratory judgment actions. Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) (Vernon 1986).

is premised upon an incorrect reading of the plain language of the new Texas statute. Due process rights of notice and an opportunity to be heard are afforded only to the "owner," even after the amendment to section 41.44(d). The second contention emphasizes the Code's "catch-22" for lienholders and reflects the Attorney General's misunderstanding of the nature of the property interest protected by the Constitution. Bellaire's protected interest – the value of its first lien – was diminished as a result of the attachment of the statutorily superior tax lien in favor of Huffman and Harris County. When those taxing authorities sought to enforce the lien, Bellaire was entitled to defend by asserting the invalidity of the lien on due process grounds.

A. The amendment to the Texas Tax Code does not afford lienholders due process.

Initially, the Attorney General argues that, although Bellaire's rights may have been violated in this case, that is unlikely to occur in the future. He asserts that section 41.44(d) of the Tax Code has been amended to allow "persons, such as Petitioner," to participate in the administrative process and challenge the tax appraisals. That assertion, which is contrary to the language of the statute, is indeed puzzling.

Section 41.44(a) of the Code provides that a "property owner" must file a written protest before a specified time in order, for instance, to protest the tax appraisal on the property. Section 41.44(d) simply defines the required contents of the protest and the amendment provides that the name of the "protesting property owner" may include

"a person claiming an ownership interest in the property even if that person is not listed on the appraisal records as an owner of the property."[2]

Neither that section nor any other guarantees a lienholder notice or an opportunity to protest the amount of the taking in terms of the appraised value of the property. The Texas court of appeals has already held in this case that the term "property owner" does not include a lienholder. Fundamental due process rights are afforded only to "owners." Thus, while the Code now permits an owner to list on his notice of protest the names of others claiming an "ownership" interest in the property, it still does not afford anyone other than the owner notice and an opportunity to protest. Despite the amendment, the Tax Code authorizes the State to diminish a lienholder's property interest through imposition of a superior lien without affording the lienholder any right to challenge in any forum the amount of the taking.

B. Bellaire is entitled to relief since its property was taken through imposition of the superior tax lien without affording it due process.

The Attorney General argues that Bellaire can be afforded no relief since the Harris County Appraisal District is not a party to this case. He contends that Bellaire's remedies are limited to suing to compel the appraisal

---

[2] This language is probably an attempt to conform with the recently enacted section 41.412(a). That section expressly allows a new owner of property to pursue a tax protest if the new owner acquires that interest after January 1 but before the deadline to file protests expires.

district to give Bellaire a hearing to contest the 1985 tax appraisal, and that Bellaire cannot assert in defense to the foreclosure suit that the lien was invalid and subordinate to Bellaire's lien.

The Attorney General's contention is wrong. He concedes, as he must, that the tax lien in issue here arose under Texas law for the benefit of Huffman and Harris County, and not for the benefit of the appraisal district. The appraisal district simply performed the valuation work and forwarded it to Huffman and Harris County so that the respective tax rates could be applied and the taxes (the amount secured by the lien) finally determined. The attachment of the lien in this case, however, constitutes a taking in violation of Bellaire's due process rights. For that reason, Bellaire is entitled to defend against the enforcement of the lien by asserting its invalidity as against whichever taxing authority seeks to enforce it.

The Attorney General overlooks the fact that Bellaire's posture in the case is defensive; it can therefore defend against the lien as an unconstitutional taking. Since the appraisal district is not involved in the enforcement process, the district's presence in this litigation is not required for Bellaire to obtain the relief to which it is entitled.

Indeed, under current Texas law it is proper for an owner who was not given notice of the reappraisal to defend against enforcement of an invalid tax lien without joining the appraisal district as a party. In *Garza v. Block Distributing Co.*, 696 S.W.2d 259, 262 (Tex. App.–San Antonio 1985, no writ) for example, the owner was not given "notice of the [appraisal] increase . . . [or] an opportunity

to be heard before his property . . . [was] encumbered by an additional tax lien." Although the appraisal district was not a party, the court affirmed a permanent injunction, inter alia, preventing the tax assessor from levying to collect the taxes assessed because of the due process violation.

Texas courts therefore recognize that when the process by which appraised value is determined is constitutionally infirm, an owner may resist efforts by the tax assessor to collect the tax thereby assessed without joining the appraisal district as a party. There is no requirement for such joinder under Texas procedural or substantive law. Moreover, there is absolutely no principled basis upon which to require, as the Attorney General proposes, that lienholders whose property interests are likewise diminished must jump through even more procedural hoops than a similarly situated owner.

This Court has likewise invalidated liens and voided assessments where a board of equalization that "represents the State" violates a landowner's right to due process by denying it an opportunity to contest the amount of the assessment. *E.g., Londoner v. City & County of Denver,* 210 U.S. 373 (1908). Where the State legislature "instead of fixing the tax itself commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the taxpayer shall have an opportunity to be heard." *Id.* at 385-86. Otherwise, that tax cannot be collected and the constitutional defect may be asserted against whoever attempts to do so. There is

no necessity for joinder of the appraisal district for Bellaire to obtain relief from the unconstitutional taking in terms of invalidation of the tax lien held by Respondents.

Moreover, the holding in *Bank of America National Trust & Savings Association v. Dallas Central Appraisal District*, 765 S.W.2d 451 (Tex. App.–Dallas 1988, writ denied), cited by the Attorney General, in no way precludes the relief sought by Bellaire here. In that case, a party became the owner of property by purchasing at a foreclosure sale before the tax appraisal notice was sent. The new owner did not receive the notice and first learned of the tax appraisal after it was too late under the Tax Code to contest it. The new owner's request that it nevertheless be given a hearing by the appraisal review board to challenge the appraisal was denied. The Texas court of appeals held that, under the Tax Code, as a property owner at the time the tax appraisal was mailed, the new owner was entitled to protest the appraised value of the property, and that the denial of that right deprived it of due process. The court therefore remanded the case with instructions that the appraisal review board conduct a hearing on the owner's protest. *Bank of America* is not on point. First, that was an action against the appraisal district for judicial review of the district's valuation of the property. It did not involve a situation where the taxing authorities were attempting to collect the taxes by foreclosure of an invalid lien, such as in Bellaire's case. The court simply granted precisely the relief sought in that case. Perhaps more importantly, however, the court did not suggest that remand to the appraisal review board was the exclusive remedy to vindicate the owner's constitutional rights or that the constitutional invalidity of the lien could not be raised as a defense in a suit to foreclose

the lien. Contrary to the Attorney General's suggestion, this important constitutional question cannot be resolved simply by reference to state rules of joinder.

The State's imposition of a superior lien, which diminished Bellaire's property interest, without giving Bellaire the opportunity to protest the extent of the lien (*i.e.*, the amount of the taking), was an unconstitutional taking. Until the State affords Bellaire due process, it should not be allowed to enforce a superior lien.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that its petition be granted and that the judgment and decision of the court of appeals be reversed and that judgment be rendered that Respondents take nothing, or alternatively that this case be remanded for trial or other proceeding.

Respectfully submitted,

ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON
& MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

DECATUR J. HOLCOMBE
ROYSTON, RAYZOR, VICKERY
& WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner

*Counsel of Record